NO. 48173-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ROBERTO DIAZ-LARA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01948-3

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID #91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Unpublished Cases

Other Authorities

Rules

Constitutional Provisions

RESPONSE TO ASSIGNMENTS OF ERROR

I. Double Jeopardy Did Not bar Retrial.

II. The Trial Court's Imposition of an Exceptional Sentence Should be Upheld.

III. The Trial Court Properly Instructed the Jury on Reasonable Doubt.

IV. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

STATEMENT OF THE CASE

The State originally charged Diaz-Lara with six counts of Child Molestation in the First Degree. CP 127-29. Three counts involved allegations that Diaz-Lara had sexual contact with J.G., his stepdaughter; the other three counts involved allegations that Diaz-Lara had sexual contact with Z.D.G., his biological daughter and J.G.'s half-sister. RP 22, 40, 2346; CP 127-29. The State also alleged three aggravating factors: that the offenses were part of an ongoing pattern of sexual abuse of a victim under the age of 18 manifested by multiple incidents over a prolonged period of time, were part of an ongoing pattern of psychological, physical or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time, and involved an abuse of trust.

CP 1-3. The State proceeded to trial on all six counts, and the case was submitted to the jury.

After about eight hours total of deliberations, the jury sent out a note indicating they were in a deadlock situation. RP 1401. The trial court brought out the entire panel and asked the presiding juror the following questions:

> COURT: Okay. You may be seated.
>
> I'm going to direct this eventually to you, so pay close attention.
>
> I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First a word of caution: Because you are in the process of deliberating, it is essential that you give no indication on how the deliberations are going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of the other members of the jury.
>
> I'm going to ask the presiding juror if there's a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict his answers to "yes" or "no" when I ask this question and not say anything else. Got it?
>
> PRESIDING JUROR: (no verbal response).
>
> COURT: So addressing the following question to the presiding juror: Is there a reasonable probability of the jury reaching a verdict within a reasonable time as to all the counts?
>
> PRESIDING JUROR: No.
>
> COURT: Is there a reasonable probability of the jury reaching a verdict within a reasonable time as to any count?

PRESIDING JUROR: No.

RP 1401-02.

This trial ended in a mistrial after the trial court declared the jury was hung. CP 892, 913; RP 1402-09. Neither the State nor Diaz-Lara agreed to the mistrial. RP 1402-06.

Diaz-Lara was tried again, but only on three counts of the original information, those involving Z.D.G. CP 1-3, 892. At this trial, the evidence showed that J.G. and Z.D.G. came to live with Michelle Fowler, a foster parent, in February 2012. RP 1692. During the five months that the girls lived with Ms. Fowler, Z.D.G. made multiple comments to her about her father, Diaz-Lara, touching her. RP 1693. Specifically, Z.D.G. told Ms. Fowler that she had something "really scary" to tell her, and that her "dad touched [her] here," pointing to her vagina. RP 1695. Z.D.G. said she was really scared. RP 1695. Z.D.G. described Diaz-Lara as touching her breasts and her vagina. RP 1695. Z.D.G. was acting nervous and scared at the time she said this. RP 1697. Another time, Z.D.G. told Ms. Fowler that Diaz-Lara had brushed his penis up against her leg when she was sleeping in bed with him and her mother. RP 1699.

Dr. Kim Copeland, a child abuse pediatrician with Legacy Health System, testified that she examined Z.D.G. and during the examination Z.D.G. told her that her father touched her on her "boobs" once while at

the mall, and that when she would sleep with her mom, her dad would touch her on her "boobs," "vagina and [] butt." RP 1742-43. Z.D.G. told Dr. Copeland that sometimes this touching was on top of clothes, and sometimes he would go under her clothes. RP 1744. Z.D.G. told her dad to stop, "but he would just keep doing it." RP 1746. Sometimes, while Diaz-Lara touched Z.D.G. on her "boobs," "vagina," or "butt," he would kiss her at the same time on her mouth, forehead, stomach, and "boobs." RP 1749-40.

Tracey Arney is the clinical director at Family Solutions, a community mental health center for children and families. RP 1765-66. She has worked as a therapist since 1998, and in that time she has worked with children that have been sexually abused. RP 1768. Ms. Arney did not work with Z.D.G., but reviewed the records of Z.D.G.'s therapy through Family Solutions. RP 1769-74. Z.D.G. saw Kristy Born, a therapist who no longer worked at Family Solutions at the time of the trial. RP 1774. Z.D.G. was diagnosed with Post-traumatic stress disorder (PTSD). RP 1792. PTSD is a collection of symptoms experienced by an individual after the individual has experienced a traumatic event. RP 1775. Specifically, someone with PTSD works to avoid thoughts and memories and experiences of the trauma, and has hyper-arousal related to the

traumatic event. RP 1775. Sexual abuse is considered a trauma that could cause PTSD. RP 1776.

Laura[1] is the mother of Z.D.G. and J.G. RP 1802-03. Z.D.G. was born on April 7, 2003. RP 1803. Laura and Diaz-Lara are married. RP 1803. Z.D.G. lived with her parents and her sister in a house, all together. RP 1802-03. Z.D.G. often slept with her parents in their bed because she did not like sleeping by herself. RP 1805. Laura confirmed there was at least one occasion when she, Diaz-Lara, and Z.D.G. went to the Vancouver mall together. RP 1808-09. Laura testified that Z.D.G. had not told her that Diaz-Lara had ever touched her. RP 1810. After CPS got involved with her children, Laura was instructed not to talk to Z.D.G. about Diaz-Lara. RP 1810-11. At some point, she told Z.D.G. that she could not see Diaz-Lara because Z.D.G. had said that Diaz-Lara did bad things to her. RP 1811. After Z.D.G. returned to her custody from foster care, Laura explained to Z.D.G. that a father kissing, hugging and "caressing" his daughter was not bad. RP 1812. After Laura explained this to Z.D.G., Z.D.G. appeared to change her mind about what was good and what was bad in terms of touching. RP 1812.

Z.D.G. was 12 years old at the time of the second trial. RP 1825. She has never been married or in a domestic partnership. RP 1826. Z.D.G.

[1] The State refers to the victim's mother by her first name to provide as much privacy to the victim as possible. The State intends no disrespect.

testified that she misses her father, loves him, and wants to be with him. RP 1828. Z.D.G. denied telling her foster mother, Ms. Fowler, that her father had touched her anywhere on her body. RP 1829. Her memory about talking to a police officer and Dr. Copeland was vague, and she wasn't sure what, if anything, she told them. RP 1829-33. Z.D.G. testified that she had previously said prior to talking to her mom about what kind of touching was okay that she thought the touching with her father happened, but after that conversation she did not think any touching happened. RP 1833. Z.D.G. denied that her father touched her on her vagina, butt, or chest. RP 1834.

Natalie Dettmer was a counselor/therapist who treated Z.D.G. RP 1860-62. In June 2012, Ms. Dettmer made a chart note that Z.D.G. had told her that adults did not want her to tell things that were happening to her, and that she worried about being a "tattletale." RP 1863-64. By September of 2012, Z.D.G. was feeling sad and mad about her father, and was missing him. RP 1867-68. In late September 2012, Z.D.G. started wondering "if [her] sister just thought it was bad even though it really wasn't." RP 1868.

The trial court instructed the jury on reasonable doubt, following WPIC 4.01. The instruction read as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each crime beyond a reasonable doubt. The defendant has no burden of proving a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence of lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 932.

The trial court gave an instruction defining "prolonged period of time," as contained in WPIC 300.17. CP 949.

The jury reached a verdict of guilty on all three counts at the second trial, and found all aggravating factors proven. CP 952-57. At sentencing, the court sentenced Diaz-Lara to an exceptional sentence of 154 months on each count, 24 months above the standard range. RP 2113, 2129; CP 958-77. At sentencing, the judge indicated it was "discount[ing]" the factors of ongoing pattern of abuse "because they are factored into the offender score of six, which [the defendant] received for being convicted of multiple counts." RP 2130. The trial court found it

would impose the same sentence if any one of the aggravating factors was not upheld on appeal. RP 2132.

Diaz-Lara timely filed this appeal. CP 978.

ARGUMENT

I. Double Jeopardy Did Not Bar Retrial.

Diaz-Lara claims the trial court improperly discharged the jury in his first trial, after the jury indicated it was deadlocked, and that his second trial violated his right to be free from twice being put in jeopardy for the same offense. The trial court properly declared a mistrial at the first trial because the jury indicated it was not possible they could come to a unanimous verdict. Diaz-Lara's right to be free from double jeopardy was not violated. Diaz-Lara's claim fails.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be … subject for the same offense to be twice put in jeopardy…." The Washington Constitution further provides that "[n]o person shall … be twice put in jeopardy for the same offense." Wash. Const. Art. I, § 9. These two provisions are treated as identical in "thought, substance, and purpose." *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). These provisions protect a criminal defendant's right to be free from a second prosecution for the same

offense after conviction or acquittal and "'to have his trial completed by a particular tribunal.'" *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). However, justice requires discharge of a jury that is unable to agree on a verdict. *Jones,* 97 Wn.2d at 163. The double jeopardy clause bars the State from retrying a defendant if jeopardy has previously attached, jeopardy was terminated, and the defendant is in jeopardy a second time for the same offense. *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). "Jeopardy attaches after a jury is selected and sworn." *State v. Juarez*, 115 Wn.App. 881, 887, 64 P.3d 83 (2003) (citing *Downum v. U.S.*, 372 U.S. 734, 737, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)). In Diaz-Lara's case it is undisputed that jeopardy attached and he was retried; the only issue is therefore whether jeopardy was terminated by the trial court's declaration of a mistrial due to a hung jury. The question of whether jeopardy was terminated is a question of law that is reviewed de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

Jeopardy is terminated for double jeopardy purposes if a defendant is acquitted, after a final conviction, or when the court dismisses the jury, that dismissal is not in the interests of justice, and the defendant did not consent to the dismissal. *State v. Strine*, 176 Wn.2d 742, 752, 293 P.3d

1177 (2013) (citing *Ervin*, 158 Wn.2d at 752-53). In Diaz-Lara's case, the only applicable situation in which jeopardy could have been terminated is if the trial court dismissed the jury and the dismissal was not in the interests of justice and was without his consent. The State agrees the trial court dismissed the jury, and that this was done without Diaz-Lara's consent. The only issue therefore is whether this dismissal was done in the interests of justice.

A hung jury has been specifically found to be "an unforeseeable circumstance requiring dismissal of the jury in the interest of justice." *Ervin*, 158 Wn.2d at 753 (citing *Green v. U.S.*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). In *Washington, supra*, the United States Supreme Court found that "without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Washington*, 434 U.S. at 509. Our Supreme Court has likewise held that "a jury which, after a reasonable time, cannot arrive at a verdict, may be discharged and the defendant tried again." *State v. Connors*, 59 Wn.2d 879, 883, 371 P.2d 541 (1962).

Appellate courts give great deference to a trial court's decision to declare a mistrial. *Jones*, 97 Wn.2d at 163. Particularly, the trial court's decision to declare a mistrial when the judge considers the jury is deadlocked is "accorded great deference by the reviewing court."

Washington, 434 U.S. at 510. In fact, "a mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial. *Id.* at 509. A trial court is in the best position to determine whether a jury will be able to reach a verdict after continued deliberations. *Id.* at 510. Specifically, the trial court is best able to "assess all the factors which must be considered in making" this determination. *Id.* There is no rigid formula the trial court must employ in determining whether a jury is deadlocked. *Wade v. Hunter*, 336 U.S. 684, 691, 69 S.Ct. 834, 93 L.Ed. 974 (1949). In *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010), the United States Supreme Court discussed that appellate courts have "never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor of defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Renico*, 559 U.S. at 775. In fact, in 1981, in a dissenting opinion, Justice Rehnquist noted that the Court had never "overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the manifest necessity standard had not been met." *Winson v. Moore*, 452 U.S. 944, 947, 101 S.Ct. 3092, 69 L.Ed.2d 960 (1981) (dissenting opinion).

In *Jones, supra,* the trial court improperly discharged a jury and double jeopardy barred the defendant's retrial. In that case, the judge allowed the jury to deliberate from 11a.m. until midnight on the first day of deliberations; at midnight, the trial judge asked the jury if it would be able to reach a verdict by 1:30 a.m. *Jones*, 97 Wn.2d at 160-61. The presiding juror said no, and all the other jurors agreed (by a show of hands). *Id.* at 161. The trial court declared a mistrial. *Id.* In finding the trial court improperly declared a mistrial based on a hung jury, our State Supreme Court noted that "[o]bviously, if the jury, through its foreman and of its own accord, acknowledges that it is *hopelessly deadlocked*, there would be a factual basis for discharge if the other jurors agree with the foreman." *Id.* at 164 (emphasis original). There, the jury never indicated it was hopelessly deadlocked; the jury only indicated that another hour and a half would not result in a verdict. Therefore the trial court did not have a factual basis to declare the mistrial. *Id.*

In *Strine, supra*, the trial court was justified in declaring a mistrial after the presiding juror indicated that a unanimous verdict could not be reached. *Strine*, 176 Wn.2d at 756-57. There the Court on review held that jeopardy had not terminated because the trial court dismissed the jury due to a manifest necessity – a hung jury. *Id.* at 757. *Strine* differs from *Jones, supra* in that the judge in *Jones* only asked whether the jury could reach a

verdict within an hour and a half, and not whether there was a reasonable probability that the jury could reach a unanimous verdict as the court did in *Strine*. As in *Strine*, the trial court in Diaz-Lara's case properly declared a mistrial based on the manifest necessity presented when the jury indicated it was deadlocked. In Diaz-Lara's case, the jury sent a note indicating it could not agree on any of the six counts. The trial court then inquired, following WPIC 4.70, as to whether there was a reasonable probability that the jury would reach a verdict, and the presiding juror indicated there was not. Thus, the facts in Diaz-Lara's case align squarely with those of *Strine*.

Diaz-Lara relies heavily on *State v. Robinson*, 146 Wn.App. 471, 191 P.3d 906 (2008) to support his argument that the trial court improperly declared a mistrial due to the hung jury in his case. However, Diaz-Lara's reliance on *Robinson* is misplaced, and his arguments about its applicability are misleading. *Robinson* dealt with a State-requested mistrial over the defendant's objection and the *Robinson* opinion specifically applies only to such cases. In Diaz-Lara's case, the State did not request a mistrial and thus the factors to consider on review of State-initiated mistrials are inapplicable here.

In *Robinson*, the State moved for a mistrial after it learned the jury had been discussing the case prior to deliberations beginning. *Robison*,

146 Wn.App. at 474-75. The jury had been instructed to not yet discuss the case, but the bailiff had a conversation with the jury which showed the jury had been discussing a witness's testimony. *Id.* at 475, n. 2. The trial court heard argument on the State's motion for a mistrial, and granted it because the jury had not followed the court's instruction, the bailiff had committed misconduct, and the knowledge of the jury's thoughts on a witness's testimony may cause the parties to proceed differently. *Id.* at 476. Prior to declaring the mistrial the trial court did not question the jurors and did not determine whether there was a manifest necessity for the mistrial. *Id.*

The *Robinson* Court set forth three factors for appellate courts to consider when determining whether a State-initiated mistrial was proper. Diaz-Lara argues these factors are considered whenever a mistrial is ordered over a defendant's objection. Br. of Appellant, p. 9. However, the *Robinson* Court's opinion is specific:

> Courts consider three factors to determine whether a *State-initiated* mistrial was properly based on manifest necessity:
>
> (1) whether the court acted precipitately ... or gave both defense counsel and the prosecutor full opportunity to explain their positions; (2) whether it accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding; and (3) whether it considered alternatives to declaring a mistrial.

Id. at 479-80 (emphasis added). The *Robinson* Court does not indicate these three factors are in any way applicable in a mistrial based on a hung jury that was *not* State-initiated, and the case law discussed above shows these factors are not the standard for review of a mistrial declared due to a hung jury.

The trial court below properly found that the jury was deadlocked and could not come to a unanimous verdict. In determining whether a jury is hopelessly deadlocked, the trial court should consider the length of time the jurors spent in deliberation in light of the length of the trial and the volume and complexity of the evidence. *Jones*, 97 Wn.2d at 164; *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978). The decision of whether to declare a mistrial under these circumstances ultimately is a delicate one, and one best left to the broad discretion of the trial court. The Supreme Court in *Washington, supra* described the difficulty of the decision well when it stated,

> [o]n the one hand, if (the trial judge) discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Washington, 434 U.S. at 509. Thus the trial court should discharge the jury when it appears to the court that "there is no reasonable probability of the jury arriving at an agreement even if given more time." *State ex rel. Charles v. Bellingham Mun. Ct.,* 26 Wn.App. 144, 148, 612 P.2d 427 (1980). In so finding, the court may properly rely upon the representations of the presiding juror as to whether the jury is deadlocked. *State v. Barnes,* 85 Wn.App. 638, 657, 932 P.2d 669 (1997); *State v. Dykstra*, 33 Wn.App. 648, 652, 656 P.2d 1137, *rev. denied*, 99 Wn.2d 1014 (1983). However, inquiring into the jury's deliberations is potentially dangerous, as a judge who inquires too early or too directly may improperly interfere with the jury's deliberations, and a judge who insufficiently inquires may fail to make a proper record for finding a deadlocked jury. *See Jones*, 97 Wn.2d at 163-64. A judge's questioning of the presiding juror may not need to be as intensive when the jury has sent out a note already providing information that indicates it is deadlocked. *Barnes*, 85 Wn.App. at 657; *State v. Fish*, 99 Wn.App. 86, 91-92, 992 P.2d 505 (1999). To aid trial courts in questioning a jury about a potential deadlock, WPIC 4.70 provides a script for judges to follow in questioning a jury as to whether there is a reasonable probability the jury could reach a unanimous verdict. WPIC 4.70.

In Diaz-Lara's case, it is clear from the record that the trial court properly found the jury was hung and declared a mistrial. The jury sent out a note indicating it was unable to agree as to any of the counts, and asked for guidance as to what to do. RP 1399-1401. The trial court then assembled the parties and asked the jury about their deliberations using WPIC 4.70 to engage in the inquiry. The presiding juror told the court that there was not a reasonable probability that the jury would reach a verdict within a reasonable time. RP 1402. This provided the trial court with a factual basis from which to find the jury was deadlocked. *See Jones, supra.* Nothing in the record suggests the trial court erred, and the scenario in which the trial court found occurring is one in which our Courts have long held is appropriate for the declaration of a mistrial. *See Ervin*, 158 Wn.2d at 753; *see also Washington*, 434 U.S. at 509.

The double jeopardy clause did not prevent the State from retrying Diaz-Lara because his original jeopardy was never terminated. The original jury was deadlocked which constituted a manifest necessity that justified a mistrial. The trial court properly declared a mistrial. Diaz-Lara's double jeopardy claim fails.

II. The Trial Court's Exceptional Sentence Should Be Upheld.

The trial court below instructed the jury on the definition of a "prolonged period of time" as it related to two aggravating factors that were alleged pursuant to WPIC 300.17. In *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015), our Supreme Court found that WPIC 300.17 was a misstatement of the law and improperly commented on the evidence. *Brush*, 183 Wn.2d at 558-59. Thus, the instruction given by the trial court in Diaz-Lara's case was an improper comment on the evidence. However, a comment on the evidence does not require automatic reversal. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). "'Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.'" *Brush, at 558-59* (quoting *State v. Levy*, 156 Wn.2d at 723)).

The evidence presented at trial showed that Diaz-Lara abused Z. for years. Despite the trial court's improper instruction that a "prolonged period of time" was anything more than a few weeks, no prejudice did or could have resulted from this instruction. The only evidence available to the jury was either that Diaz-Lara committed this abuse for years, or that no abuse occurred. The jury clearly rejected the version in which no abuse occurred, thus accepting that the abuse occurred for years, and convicted Diaz-Lara of all offenses charged at the second trial. Diaz-Lara never even

challenged that the time period in which the abuse was alleged constituted a "prolonged period of time." RP 2050-57. In an unpublished 2016 case,[2] Division I of this Court placed significant importance on the fact that the defendant did not contest that the time period alleged constituted a prolonged period of time. *State v. Corbett,* 192 Wn.App. 1050, Slip Op. 72453-3-I (Feb. 29, 2016), slip op. at 8. In *Corbett*, the evidence showed the abuse occurred over a decade, and the defendant did not challenge the length of the alleged abuse and whether the period of time constituted a prolonged period was not an issue in the case. *Id.* In another case out of Division I, the Court again found that the defendant's failure to contest that the alleged time period was a prolonged period of time contributed to the harmlessness of the instruction. *State v. Hood,* No. 73401-6-I, ___ P.3d ___, 2016 WL 5375194 (September 26, 2016). There the court stated, "[i]f the jurors believed the evidence of the prior domestic abuse, they could not have failed to find that the domestic abuse occurred over a prolonged period of time. Thus the erroneous instruction was not prejudicial." *Id.* at 4 (citing *Levy,* 156 Wn.2d at 721-22). The same is true in Diaz-Lara's case. Diaz-Lara contested whether the abuse occurred, but he never challenged whether the time period alleged constituted a

[2] In an amendment effective September 2016, this Court permits citation to unpublished cases issued after March 1, 2013, as long as the citing party notes it as an unpublished case. GR 14.1(a). Unpublished cases are not binding authority on this Court, and this Court shall give it as much weight as it deems fit.

"prolonged period" or not. Based on the record below, and the jury's verdict, this Court can be satisfied that no prejudice occurred from the trial court's instruction.

However, even if this Court does not find it is satisfied that no prejudice occurs, and it reverses the two aggravating factors affected by this improper instruction, this Court should affirm the sentence, as the trial court found that any one of the aggravating factors would result in the same exceptional sentence it imposed. "A reviewing court can affirm an exceptional sentence even though not every aggravating factor supporting the exceptional sentence is valid." *State v. Weller*, 185 Wn.App. 913, 930, 344 P.3d 695 (2015), *rev. denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015). If the reviewing court is satisfied that the trial court would have imposed the same sentence based upon one or more aggravating factors that have been upheld, then it may uphold the exceptional sentence instead of remanding for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). "This rule is particularly appropriate when the trial court expressly states that the same exceptional sentence would be imposed based on any one of the aggravating factors standing alone." *Weller*, 185 Wn.App. at 730 (citing to *State v. Nysta*, 168 Wn.App. 30, 54, 275 P.3d 1162 (2012)).

At sentencing, the trial court clearly found the exceptional sentence was based on any of the aggravating factors standing alone, by finding that if any aggravating factor was not upheld on appeal that the same sentence would be imposed. RP 2132; CP 960. The trial court further indicated it was "discount[ing]" the factors of ongoing pattern of abuse "because they are factored into the offender score of six, which [the defendant] received for being convicted of multiple counts." RP 2130. Thus this Court can be satisfied that the trial court below would have imposed the same sentence based upon only one aggravating factor. As such, this Court should affirm the exceptional sentence imposed by the trial court. *See Jackson*, 150 Wn.2d at 276.

III. The Trial Court Properly Instructed the Jury on Reasonable Doubt.

Diaz-Lara claims the trial court's instruction on reasonable doubt, an exact rendition of WPIC 4.01, was improper and prejudiced his right to a fair trial. WPIC 4.01 has been upheld numerous times, most recently by this Court in July of this year. Diaz-Lara's claim is meritless. The trial court's instruction to the jury was proper.

This Court reviews a challenge to a jury instruction de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). A trial court must clearly define reasonable doubt and indicate that the State bears the burden

of proof. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Diaz-Lara specifically alleges the trial court impermissibly encouraged the jury to undertake a search for the truth. Br. of Appellant, p. 17. The trial court instructed the jury based on WPIC 4.01, providing,

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence of lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 932. This language has been approved by our State Supreme Court. *See Bennett, supra; State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Diaz-Lara cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) arguing that the "belief in the truth" language contained in the court's instruction to the jury encouraged the jury to search for the truth.

This Court addressed the exact argument in *State v. Jensen,* 194 Wn.App. 900, 378 P.3d 270 (2016). There, this Court held:

> The circumstances in *Emery* are different than those here. To invite a jury to declare the truth mischaracterizes the jury's role, suggesting that its role is to solve the case. *Emery*, 174 Wn.2d at 760, 278 P.3d 653. The existence or nonexistence of an 'abiding belief in the truth,' however, correctly invites the jury to weigh the evidence. We, therefore, hold that the trial court's instruction accurate defined reasonable doubt and clearly communicated the State's burden of proof.

Jensen, 194 Wn.App. at 902. In so holding, this Court adopted the reasoning of Division I in its decision in *State v. Federov*, 181 Wn.App.

187, 324 P.3d 784 (2014). There, Division I reasoned that "the instructions precisely stated the law because 'belief in the truth' phrase 'accurately informs the jury its job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.'" *Jensen*, 194 Wn.App. at 902 (quoting *Federov*, 181 Wn.App. at 200).

There is no basis for this Court to depart from its decision in *Jensen, supra*. The trial court properly instructed the jury on reasonable doubt, following WPIC 4.01. Diaz-Lara's argument fails, and his convictions should be affirmed.

IV. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

Diaz-Lara argues under *State v. Sinclair*, 192 Wn.App. 280, 367 P.3d 612 (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192

Wn.App. 380, 386, 367 P.3d 612 (2016); *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn.App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra*, prematurely raises an issue that is not yet before the Court. Diaz-Lara could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted

in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

Diaz-Lara's claims of error fail. His convictions and exceptional sentence should be affirmed.

DATED this 17th day of October, 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTOR

October 17, 2016 - 4:01 PM

Transmittal Letter

Document Uploaded: 4-481731-Respondent's Brief.pdf

Case Name: State v. Roberto Diaz-Lara
Court of Appeals Case Number: 48173-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Pamela M Bradshaw - Email: pamela.bradshaw@clark.wa.gov

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com
backlundmistry1@gmail.com